

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

AMANA SOCIETY, INC. and AMANA  
FARMS, INC.,

Plaintiffs,

vs.

EXCEL ENGINEERING, INC.,

Defendant.

No. 10-CV-168-LRR

**FINAL JURY INSTRUCTIONS**

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Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of trial or during trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

## **INSTRUCTION NO. 1**

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

## INSTRUCTION NO. 2

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, you may consider a witness's intelligence, the opportunity a witness had to have seen or heard the things testified about, a witness's memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection, a lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

### INSTRUCTION NO. 3

You will have to decide whether certain facts have been proved by the greater weight of the evidence. A fact has been proved by the greater weight of the evidence if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable.

You have probably heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

#### **INSTRUCTION NO. 4**

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

## **INSTRUCTION NO. 5**

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. It is for you to decide how much weight, if any, you will give to them. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

## **INSTRUCTION NO. 6**

You will remember that certain summaries or charts were admitted in evidence. You may use those summaries or charts as evidence, even though the underlying documents and records are not here.

## INSTRUCTION NO. 7

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become experts in some field may state their opinions on matters in that field and may also state the reasons for their opinions.

Expert testimony should be considered just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used and all the other evidence in the case.

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proven by the evidence, you should decide if that omission affects the value of the opinion.

## **INSTRUCTION NO. 8**

Certain testimony has been received into evidence from a deposition. A deposition is the recorded answers a witness made under oath to questions asked by lawyers before trial. The deposition testimony to be offered was in some cases recorded in writing, and in other cases was electronically videotaped. You should consider the deposition testimony, and judge its credibility, as you would that of any witness who testifies here in person. You should not place any significance on the manner or tone of voice used to read the witness's answers to you.

## INSTRUCTION NO. 9

You have heard evidence claiming certain witnesses made statements before this trial while not under oath which were inconsistent with what those witnesses said in this trial. Because the witnesses did not make the earlier statements under oath, you may use the earlier statements only to help you decide if you believe the witnesses.

Decide if the earlier statements were made and whether they were inconsistent with the testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the testimony if other evidence you believe supports it or if you believe it for any other reason.

## **INSTRUCTION NO. 10**

You have heard evidence claiming certain witnesses made statements before this trial while under oath which were inconsistent with what those witnesses said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe these witnesses. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it or if you believe it for any other reason.

## INSTRUCTION NO. 11

You have heard evidence claiming a party made statements before this trial either while under oath or while not under oath.

If you find such a statement was made, you may regard the statement as evidence in this case, just as if the party had made it under oath during the trial.

If you find such a statement was made and was inconsistent with that party's testimony during the trial, you may also use the statement as a basis for disregarding all or any part of the party's testimony during the trial, but you are not required to do so. You should not disregard the party's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

## INSTRUCTION NO. 12

Exhibits have been admitted into evidence and are to be considered along with all of the other evidence to assist you in reaching your verdict. You are not to tamper with the exhibits or their contents, and you should leave the exhibits in the jury room in the same condition as they were received by you.

Documents referred to but not admitted into evidence will not be available to you during deliberations.

### INSTRUCTION NO. 13

The parties have stipulated—that is, they have agreed—that certain facts are as counsel have stated. You should, therefore, treat those facts ~~has~~ having been proved.

**INSTRUCTION NO. 14**

The fact that the parties in this case are corporations should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

## **INSTRUCTION NO. 15**

Although a corporation is often treated under the law as if it were a person, a corporation can act only through its employees, officers, directors and agents. Therefore, a corporation can be held responsible under the law for the acts or omissions of its employees, officers, directors and agents performed within the scope of their authority.

## INSTRUCTION NO. 16

Amana brought a lawsuit for money damages against GHD, Inc. (“GHD”) and Excel Engineering, Inc. (“Excel”). Amana claims GHD was negligent and that it breached its design warranty. Amana claims Excel was negligent in performing the third-party review and evaluating the technical feasibility of the project called for in the technical section of the United States Department of Agriculture grant application for Amana.

Excel denies Amana’s claims and alleges that Amana and GHD were negligent and that GHD breached its warranty with Amana.

Prior to the beginning of trial, Amana resolved its claims against GHD.

### **INSTRUCTION NO. 17**

“Negligence” means the failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. “Negligence” is doing something a reasonably careful person would not do under similar circumstances or failing to do something a reasonably careful person would do under similar circumstances.

## INSTRUCTION NO. 18

GHD and Excel had a duty to use the degree of skill, care and learning possessed and exercised by members of the engineering profession in similar circumstances. A violation of this duty is negligence.

For Amana, “negligence” means the failure to use ordinary care.

## **INSTRUCTION NO. 19**

In these instructions I use the term "fault." Fault means one or more acts or omissions toward the property of the actor or of another which constitutes negligence or breach of warranty.

## INSTRUCTION NO. 20

In order to recover on its claim against Excel, Amana must prove all of the following propositions:

1. Excel was negligent in performing the third-party review and evaluating the technical feasibility of the project called for in the technical section of the United States Department of Agriculture grant application for Amana in one or more of the following ways:
  - (a) failing to question what size the digester would have to be and what equipment would be necessary to make the project viable;
  - (b) failing to review whether the projected power output was reasonable and achievable;
  - (c) failing to compare the projected costs of the design to projects of similar size, scope and complexity; and/or
  - (d) failing to perform an adequate review of the technical components of the grant application;
2. Excel's negligence was a cause of damage to Amana; and
3. The amount of damage.

If Amana has failed to prove any of these propositions, Amana is not entitled to damages. If Amana has proved all of these propositions, you will consider the defense of comparative fault as explained in Instruction Numbers 23 through 30.

## **INSTRUCTION NO. 21**

You must decide whether the claimed harm to Amana is within the scope of Excel's liability. Amana's claimed harm is within the scope of Excel's liability if that harm arises from the same general types of risk that Excel should have taken reasonable steps to avoid.

**INSTRUCTION NO. 22**

If you find that Amana has proved its negligence claim against Excel, you must then consider the comparative fault defense raised by Excel. I will explain that defense to you now.

### INSTRUCTION NO. 23

Excel claims that GHD was at fault in one or more of the following particulars:

1. GHD was negligent; and/or
2. GHD breached its express warranty.

These grounds of fault are explained to you in Instructions Number 24 and 25.

Excel must prove both of the following propositions:

1. GHD was at fault. In order to prove fault, Excel must prove GHD was negligent as set out in Instruction Number 24 or that GHD breached its express warranty as set out in Instruction Number 25; and
2. GHD's fault was a cause of Amana's damage.

If Excel has failed to prove either of these propositions, then it has not proved its defense. If Excel has proved both of these propositions, then you will assign a percentage of fault against GHD and include GHD's fault in the total percentage of fault found by you in the appropriate place on the verdict form.

## INSTRUCTION NO. 24

Excel claims that GHD was negligent in one or more of the following ways:

1. Negligently designing and constructing the digester;
2. Failing to provide project oversight;
3. Failing to provide ongoing engineering services following the initiation of construction;
4. Failing to design the digester in a manner that produced the promised level of electrical production; and/or
5. Failing to properly size the digester to handle the amount of substrate needed to meet the projected electrical outputs projected.

Excel must prove both of the following propositions:

1. GHD was negligent; and
2. GHD's negligence was a cause of Amana's damage.

If Excel has failed to prove either of these propositions, then it has not proved its defense. If Excel has proved both of these propositions, then you will assign a percentage of fault against GHD and include GHD's fault in the total percentage of fault found by you in the appropriate place on the verdict form.

## INSTRUCTION NO. 25

Excel claims that GHD is at fault for breaching its express warranty to Amana. An express warranty is any affirmation of fact or promise by a seller about a product or service which naturally or ordinarily leads the buyer to purchase the product or service, and the buyer purchases the product or service relying upon the affirmation or promise. Excel must prove all of the following propositions:

1. GHD sold an anaerobic digester and expressly warranted that the GHD digester system would have a three-year warranty on equipment, a ten-year warranty on design from the time of substantial completion, and that the digester would achieve a certain level of electrical production;
2. Amana made the purchase relying on the express warranty;
3. The anaerobic digester did not conform to the express warranty;
4. The breach of express warranty was a cause of the plaintiff's damage; and
5. The amount of damage.

If Excel has failed to prove any of these propositions, then it has not proved its defense. If Excel has proved all of these propositions, then you will assign a percentage of fault against GHD and include GHD's fault in the total percentage of fault found by you in the appropriate place on the verdict form.

## INSTRUCTION NO. 26

Excel claims that Amana was at fault through negligence. This ground of fault is explained to you in Instruction Number 27.

Excel must prove both of the following propositions:

1. Amana was at fault. In order to prove fault, Excel must prove Amana was negligent as set out in Instruction Number 27; and
2. Amana's fault was a cause of Amana's damage.

If Excel has failed to prove either of these propositions, Excel has not proved its defense. If Excel has proved both of these propositions, then you will assign a percentage of fault against Amana and include Amana's fault in the total percentage of fault found by you in the appropriate place on the verdict form.

## INSTRUCTION NO. 27

Excel claims that Amana was negligent in one or more of the following ways:

1. Failing to hire a consultant to act as its representative;
2. Providing inaccurate information regarding the substrates;
3. Failing to properly test the substrates; and/or
4. Substituting the Genencor material as a substrate, which was toxic to the digester.

Excel must prove both of the following propositions:

1. Amana was negligent; and
2. Amana's negligence was a cause of its damage.

If Excel has failed to prove either of these propositions, then it has not proved its defense. If Excel has proved both of these propositions, then you will assign a percentage of fault against Amana and include Amana's fault in the total percentage of fault found by you in the appropriate place on the verdict form.

## **INSTRUCTION NO. 28**

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

There can be more than one cause of an injury or damage. When the fault of two or more separate parties is so related to an event that their combined fault, when viewed as a whole, is the cause of the event without which the event would not occur, then the fault of each party may be a cause.

## INSTRUCTION NO. 29

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of Amana, Excel and GHD and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages.

In arriving at a percentage of fault, you cannot arrive at a figure by taking down the estimate of each juror as to the percentage of fault, and agreeing in advance that the average of these estimates will be your percentage of fault.

### INSTRUCTION NO. 30

After you have compared the conduct of all parties, if you find Amana was at fault and that Amana's fault was more than 50% of the total fault, Amana cannot recover damages.

However, if you find Amana's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of Amana's fault.

If you assign to a party less than 50% of the total fault, that party will only be liable to the extent of the percentage of fault assigned by you. I will order Excel to contribute to the payment of damages awarded on the basis of the percentage of fault, if any, you insert in your answers to the questions at the end of these instructions.

### INSTRUCTION NO. 31

I will now provide you with certain instructions on determining what, if any damages a party is entitled to receive. The fact that I am instructing you on the proper measure of damages should not be considered as an indication that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find that Amana is entitled to damages in accord with the other instructions.

You must not award damages under these Instructions by way of sympathy or punishment. Remember that, throughout your deliberations on damages, as on all other issues, you must not engage in any speculation, guess or conjecture. Your judgment must not be exercised arbitrarily or out of sympathy or prejudice for or against any of the parties. Rather, you must use your sound judgment based upon an impartial consideration of the evidence.

In arriving at the amount of damages on a claim, you cannot establish a figure by taking down the estimate of each juror as to damage and agreeing in advance that the average of those estimates shall be your award of damages for that claim.

### INSTRUCTION NO. 32

The measure of damages is the amount that would place Amana in as good a position as it would have enjoyed absent any negligence.

In your consideration of the damages, you may consider the following:

1. Amana's cost of construction and remediation of the digester; or
2. (a) The diminution or loss in value of the digester and (b) lost income to Amana from the digester.

If you determine Amana is entitled to damages, you shall use the measure of damages that results in the greater recovery to Amana.

### INSTRUCTION NO. 33

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

### INSTRUCTION NO. 34

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

*First*, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because your verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or simply to reach your verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

(CONTINUED)

**INSTRUCTION NO. 34 (Cont'd)**

*Fourth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Your answers to the questions on the verdict form must be unanimous. Nothing I have said or done is intended to suggest what your verdict might be—that is entirely for you to decide.

**INSTRUCTION NO. 35**

Attached to these instructions you will find the Verdict Form. This is simply the written notice of the decisions that you reach in this case. The answers to the Verdict Form must be the unanimous decisions of the jury.

You will take the Verdict Form to the jury room, and when you have completed your deliberations and each of you has agreed to the answers to the Verdict Form, your foreperson will fill out the Verdict Form, sign and date it and advise the Court Security Officer that you are ready to return to the courtroom. Your foreperson should place the signed Verdict Form in the blue folder, which the court will provide you, and then your foreperson should bring the blue folder when returning to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return the Verdict Form in accord with the evidence and these instructions.

September 24, 2012  
Date

Linda R. Reade  
Linda R. Reade, Chief Judge  
United States District Court  
Northern District of Iowa